UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 524

Case No. 484: STEIN

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr Ioan Voicu;

Whereas, on 4 November 1988, Richard M. Stein, a staff member of the Food and Agriculture Organization of the United Nations (FAO), filed an application containing the following pleas:

"PLEAS

The Applicant respectfully requests that the Tribunal:

(a) Rescind the decision of the Standing Committee of the United Nations Joint Staff Pension Fund [sic] taken at its 168th meeting held in Geneva from 20 to 24 June 1988, concerning the rate of accumulation applied to the Applicant's contributory service following his re-entry into the fund on 3 June 1984;

(b) Rescind the decision of the United Nations Joint Staff Pension Board taken at its 35th Session in 1986, on applicable rates of accumulation;

(c) Order the United Nations Joint Staff Pension Board to implement Judgement No. 360 of the Tribunal, Case No. 338: Taylor, in a manner fully consistent with the terms of that Judgement, in particular with respect to the applicable 'rates of accumulation for periods of contributory service', taking into account, inter alia:

(i) The 'express desire' of the United Nations General Assembly ... to make the change in the relevant Rules [of the UNJSPF], pro futuro only and not pro praeterito (Cf. Judgement No. 360, paragraph XXI); and

(ii) The principle of non-discrimination;

(d) Order the Board to take whatever other action the Tribunal deems necessary to implement paragraphs XXII, XXIII and XXIV of the aforementioned Judgement."

Whereas the Respondent filed his answer on 30 November 1990;

Whereas the Applicant filed written observations on 22 February 1991;

Whereas the facts in the case are as follows:

The Applicant has been a participant in the United Nations Joint Staff Pension Fund (the "Pension Fund") since 1969. He was initially employed by the International Atomic Energy Agency (IAEA) from 16 January 1969 to 19 June 1975. On his separation from the service of IAEA, he opted for a full deferred retirement benefit under article 31(b) of the Regulations of the Pension Fund then in force. On 3 June 1984, the Applicant entered the service of another member organization of the Fund, FAO, of which he is currently a staff member.

By its resolution 37/131 of 17 December 1982, the General Assembly approved a series of measures proposed by the United Nations Joint Staff Pension Board (UNJSPB) to improve the actuarial balance of the Pension Fund, including several amendments to the Regulations of the Pension Fund that took effect from 1 January 1983. One of the measures adopted amended article 24 of the Pension Fund Regulations to permit the restoration of prior contributory service only if it amounted to less than five years.

The same resolution also introduced into new article 28(b) of the Regulations (formerly article 29) a new scale of rates of accumulation applicable "in the case of a participant who enters the Fund on or after 1 January 1983". By its resolution 38/233 of 20 December 1983, the General Assembly further amended this provision by making the new scale applicable instead to "periods of participation commencing on or after 1 January 1983" and introducing a special transitional provision dealing with participants whose prior period of contributory service had ended between 1 January 1978 and 31 December 1982.

On 8 November 1985, the Tribunal rendered Judgement No. 360, Taylor v. UNJSPB, in which it held that the right to restore a longer period of contributory service, which existed under the previous Regulations of the Pension Fund, had been preserved by the 1982 amendment and hence could be invoked by former participants who re-entered the Pension Fund even after the date of the amendment (Cf. Taylor, paras. XX-XXII).

On 9 April 1986, the Secretary of the FAO Staff Pension Committee informed the Applicant that, "restoration [was] now possible of [his] pre-1983 contributory service even though it was for a period of five years or longer", and that, in view of his election of a full deferred retirement benefit upon separation from the IAEA, his prior contributory service had been restored.

On 17 September 1986, the Applicant wrote to the Officer-in-Charge of FAO's Social Security Group, requesting, inter alia, information on the rate of accumulation to be applied in the calculation of his eventual retirement benefit from the Pension Fund. Having received no reply, on 27 August 1987, the Applicant wrote to the Secretary of the FAO Staff Pension Committee, requesting information concerning the manner in which his prior contributory service with the IAEA was being taken into account, the rate at which it had been restored and the rate of accumulation being applied since June 1984, when he became an FAO staff member.

In a reply dated 4 September 1987, the Deputy Secretary of the FAO Staff Pension Committee informed the Applicant that, in accordance with a decision taken by the UNJSPB at its 35th session, in August 1986:

(a) With respect to the restored period of the Applicant's contributory service at IAEA, running from 16 January 1969 to 19 June 1975, a 2 per cent rate of accumulation would apply; and

(b) With respect to his new period of contributory service at FAO, commencing on 3 June 1984, a 1.5 per cent rate of accumulation would apply to the first five years; a 1.75 per cent rate to the next five years, and a 2 per cent rate thereafter.

On 1 October 1987, the Applicant requested a review by the FAO Staff Pension Committee, under Section K, paragraph 5, of the Administrative Rules of the Pension Fund, of the decision communicated to him on 4 September. On 4 November 1987, the Deputy Secretary of the FAO Staff Pension Committee

informed the Applicant that the FAO Staff Pension Committee had unanimously upheld its Deputy Secretary's decision, "as it was found to be in conformity with the Regulations of the United Nations Joint Staff Pension Fund and the decision taken by the Pension Board at its 35th Session on the rates of accumulation to be applied in cases similar to [his] own".

On 30 December 1987, the Applicant lodged an appeal with the Standing Committee of UNJSPB. The Standing Committee considered the Applicant's case at its 168th meeting, held from 20 to 24 June 1988, and upheld the decision of the FAO Staff Pension Committee "on the grounds that the decision was in conformity with a decision of the Board in 1986 on this subject, taken pursuant to the provisions of article 28(b) in the Fund's Regulations". On 13 July 1988, the Secretary of the Pension Board informed the Applicant of this decision.

On 4 November 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision by the UNJSPB to distinguish between staff separated from service prior to 1 January 1978 and staff separated between that date and 31 December 1982, and to apply different rates of accumulation to the periods of contributory service, was an improper application of the Tribunal Judgement No. 360, Taylor.

2. The Applicant is entitled, under the Taylor Judgement, to continue to benefit from a rate of accumulation of 2 per cent per annum during his service with FAO.

3. The Respondent impermissibly discriminates against the Applicant and other staff similarly situated.

Whereas the Respondent's principal contentions are:

1. The Respondent never questioned the applicability of the Taylor Judgement to the Applicant's case, and hence allowed him to restore his prior service, crediting it at the rate of 2 per cent per annum.

2. The Respondent determined the rate of accumulation to be applied to the Applicant's subsequent service with FAO in accordance with the Regulations of the Pension Fund in force, the Taylor case having no bearing thereon.

The Tribunal, having deliberated from 13 to 30 May 1991, now pronounces the following judgement:

I. The Applicant in this case challenges and asks for rescission of a decision of the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) concerning the rate of accumulation applied to the Applicant's contributory service following his resumption of employment in a member organization of the Pension Fund beginning 3 June 1984, namely with FAO. The decision in question was taken by the Standing Committee at its meeting during the latter part of June 1988. The Applicant also asks for rescission of the 1986 decision of the UNJSPB on applicable rates of accumulation, which was affirmed by the Standing Committee. The basis for the relief sought by the Applicant is his belief that the contested decisions are in conflict with the Tribunal's Judgement No. 360, Taylor (1985), and that they fail to take into account the wish of the General Assembly to make only prospective changes in the relevant Regulations of the Pension Fund. The Applicant also invokes the principle of non-discrimination in support of his pleas.

II. Prior to his employment by FAO on 3 June 1984, the Applicant had from 16 January 1969 to 19 June 1975, been a staff member of IAEA. On separation from the Agency, he elected a deferred pension benefit. Before the Applicant's 1984 employment by FAO, significant changes had been made to the Regulations by the General Assembly, on the recommendation of the UNJSPB. These were aimed at alleviating the then unfavourable actuarial imbalance in the Pension Fund through economy measures. The measure pertinent here appears in article 28(b) of the Pension Fund Regulations. It is a prospective reduction in rates of accumulation effective 1 January 1983, and a related transitional provision.

III. Prior to 1 January 1983 and during the Applicant's earlier employment with IAEA, the annual rate of accumulation for pensions was 2 per cent for the first 30 years of service. In December 1982, the General Assembly modified the accumulation rate by providing that effective 1 January 1983, the rate would be 1.5 per cent for the first five years of contributory service, 1.75 per cent for the next five years of contributory service, and 2 per cent for contributory service in excess of 10 but not exceeding 25 years. As a transitional measure adopted in December 1983, the General

Assembly provided that, in respect of a participant with a prior period of contributory service of five years or more ending between 1 January 1978 and 31 December 1982, the applicability of the 1.5 per cent, the 1.75 per cent and the 2 per cent rates would be calculated by taking into account, as periods of contributory service, the period of contributory service before 1 January 1983.

IV. This meant that a staff member who, for example, had previously ended five years of contributory service on 2 January 1978 and who returned to contributory service on 2 January 1983, would avoid the otherwise required five-year period of accumulation at 1.5 per cent and instead be eligible for accumulation at the 1.75 per cent rate for five years and thereafter at the 2 per cent rate for the next 25 years. On the other hand, a participant with a prior period of contributory service of five years or more, such as the Applicant, whose prior period ended before 1 January 1978, would upon a return to contributory service after 1 January 1983, have a 1.5 per cent rate of accumulation for the first five years of resumed contributory service, 1.75 per cent for the next five years, and 2 per cent thereafter.

V. The Applicant asserts that his application may be resolved by the answer "to one simple query: did the decision taken by the United Nations Joint Staff Pension Board ... in June 1986 constitute a proper application of the Tribunal's Judgement in the Taylor case (Judgement No. 360)". The June 1986 decision referred to in the quoted words is, of course, the application to the Applicant under article 28(b) of the 1.5 per cent and the 1.75 per cent rates of accumulation for the two five-year periods following his resumed employment. This, in the Applicant's view, represents a departure from the Tribunal's decision in Taylor. The Applicant believes that a proper application of Taylor in his circumstances would require that he receive the benefit of the 2 per cent (or at the very least, perhaps the 1.75 per cent) rate of accumulation upon his employment by FAO on 3 June 1984, along with the restoration of his prior contributory service. The Applicant's analysis leads him to conclude that, in spite of Taylor and the intent of the General Assembly to avoid retroactive application of the modifications embodied in article 28(b), he has nevertheless been the victim of retroactivity in their

application. He asserts, in effect, that when he separated from the IAEA in 1975, he remained a participant in the Pension Fund by having elected a deferred pension, and retained a right, conditioned upon his return to contributory service at some later date, not only to his prior contributory service but also to application in the future of the 2 per cent rate of accumulation that was applicable to his contributory service at the time he separated.

VI. The Tribunal does not agree with either the Applicant's reading of Taylor or with his understanding of the intent of the General Assembly regarding prospective application of the modifications reflected in article 28(b). To begin with, Taylor did not deal at all with the issue of rates of accumulation. As pointed out in paragraph XXIV of Taylor, the pleas seeking adjustment and calculation of benefits in a specific manner were deferred for consideration at an appropriate time in the future if there was a need for their consideration by the Tribunal. All that the Tribunal ordered in Taylor was rescission of "the decision denying [Taylor's] requests for restoration of his prior contributory service and, at the appropriate time [calculation of] his benefits accordingly". In Taylor, therefore, the Tribunal held only that Taylor's conditional right to restoration of his prior contributory service, as it existed on 31 March 1982, was preserved by the terms of the relevant amending resolutions of the General Assembly.

VII. A conditional right to restoration of prior contributory service, however, by no means creates or implies the existence of a right with respect to rates of accumulation applicable to potential service in the future. See Separate Opinion of Mr. Roger Pinto, Judgement No. 360, Taylor (1985), paragraphs V, VII and IX, and Judgement No. 82, Puvrez (1961). That the Applicant had previously elected a deferred pension is irrelevant to this issue. The Tribunal is unable to find any indication whatever of an intent on the part of the General Assembly to deprive itself of flexibility with regard to pension benefits with respect to future periods for persons not then in the employ of an organization within the common system, but who might become staff members in the future. Yet, acceptance of the Applicant's contentions would have precisely that effect. The action of the General

Assembly reflected in the modifications of article 28(b) discloses, on the contrary, a clear intent to establish for future staff members a somewhat different and more economical regime for the calculation of pension benefits. Even apart from this clear manifestation of intent by the General Assembly, the Tribunal is unable to find in the Applicant's terms and conditions of employment during the period from 1969 to 1975, any conditional right earned or possessed by him to a specific method for the calculation of pension benefits relating to future periods of employment following a termination and resumption of employment at a later date. In short, the Applicant received exactly what he was entitled to under Taylor when, upon his return to employment, his prior contributory service was restored and he was informed that the 2 per cent rate of accumulation earned by him with respect to that prior period of contributory service would still be applied to it in the calculation of his pension benefits. Nothing in Taylor, however, required that the Applicant be exempted from the provisions of article 28(b)(i) and (ii) (as adopted with effect from 1 January 1983 and modified with effect from 1 January 1984) dealing with the 1.5 per cent and 1.75 per cent rates of accumulation.

VIII. The Applicant also argues that the General Assembly acted arbitrarily and in a discriminatory fashion in limiting the benefit of the transitional provision regarding prior periods of contributory service to participants whose prior service ended between 1 January 1978 and 31 December 1982. The Applicant claims that this transitional provision is also irrational in that it may benefit staff members who were separated for periods longer than the nine-year period of his separation, merely because their prior service ended within the five-year period between 1 January 1978 and 31 December 1982. The Tribunal does not find this transitional provision to be unlawful. The evidence shows that the basis for the cut-off date was a belief that persons who separated earlier had a more tenuous connection with the member organizations of the Pension Fund. This is not an unreasonable or irrational premise.

IX. It was within the authority of the General Assembly to establish such a cut-off period prior to 1 January 1983, for the transitional treatment it

wished to establish. That the Applicant's situation did not make him eligible for that transitional treatment is not tantamount to unlawful discrimination. Any transitional arrangement inevitably results in some who benefit and some who do not. The General Assembly could reasonably conclude that it wished to restrict the transitional arrangement to persons who had separated within five years of the effective date of the modification of the rate of accumulation. It was not required to establish, though it might have, a maximum limit on the duration of the period of separation in order to deal with the hypothetical situation envisioned by the Applicant in which a staff member whose prior period of separation was for longer than the Applicant's nine years might nevertheless be eligible for the benefit of the transitional provision. In making the transitional period recommendation adopted by the General Assembly, the Standing Committee, acting on behalf of UNJSPB, obviously felt that the tenuousness of a staff member's connection with the Pension Fund could be measured adequately on the basis of a five-year period preceding 1 January 1983. The reason for this appears to be that the Standing Committee's primary concern related to numerous persons who, because of the nature of their work, tended to experience separations from employment for "months, sometimes years". Hence, the Standing Committee's recommendation represented a reasoned judgement. That there might be exceptional cases of the sort hypothesized by the Applicant, while perhaps leading to unintended results, does not, in itself, invalidate the transitional period decided upon by the General Assembly.

X. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Ioan VOICU
Member

Geneva, 30 May 1991

Paul C. SZASZ
Acting Executive Secretary